

**Before the
Federal Communications Commission
Washington, D.C. 20554**

In the Matter of)
)
Amendment of the Commission's)
Rules To Permit Flexible) WT Docket No. 96-6
Service Offerings in the)
Commercial Mobile Radio Services)
)

**FIRST REPORT AND ORDER
AND
FURTHER NOTICE OF PROPOSED RULE MAKING**

Adopted: June 27, 1996

Released: August 1, 1996

Comment Date: [90 days after Federal Register publication]

Reply Comment Date: [120 days after Federal Register publication]

By the Commission:

TABLE OF CONTENTS

	<u>Paragraph</u>
I. Introduction and Executive Summary	1
II. Background	5
III. REPORT AND ORDER	
A. Flexible Use of Spectrum	10
B. Technical and Operational Rules	26
C. Table of Frequency Allocations	30
D. Universal Service Obligations	35
E. Regulatory Treatment of Fixed Services	39
IV. FURTHER NOTICE OF PROPOSED RULE MAKING	40

V. CONCLUSION	58
VI. PROCEDURAL MATTERS	
A. Regulatory Flexibility Act	59
B. Ex Parte Rules -- Non-Restricted Proceeding	60
C. Initial Paperwork Reduction Act of 1995 Analysis	61
D. Comment Dates	62
E. Ordering Clauses	64
F. Contacts for Information	66

APPENDIX A: List of Commenters

APPENDIX B: List of Reply Commenters

APPENDIX C: Final Rules

APPENDIX D: Regulatory Flexibility Analysis

I. INTRODUCTION & EXECUTIVE SUMMARY

1. In the *Notice of Proposed Rule Making* in WT Docket No. 96-6 ("*Notice*"),¹ released on January 25, 1996, we sought comment on proposals for expanding permitted offerings of fixed wireless service by Commercial Mobile Radio Service ("CMRS") providers. In addition, we sought comment with regard to the regulatory treatment for such services under Section 332 of the Communications Act of 1934, as amended.² We received 52 comments and 22 reply comments in response to the *Notice*.³ That record shows strong support for allowing the provision of fixed wireless services by licensees operating in the CMRS bands. In this *First Report and Order*, we conclude that, while licensees previously could provide some fixed services over CMRS spectrum,⁴ the public interest would be served by giving licensees maximum flexibility in the uses of CMRS spectrum. Allowing service providers to offer all types of fixed, mobile, and hybrid services will allow CMRS providers to better respond to market demand and increase competition in the provision of telecommunications services.

¹ Amendment of the Commission's Rules to Permit Flexible Service Offerings in the Commercial Mobile Radio Services, *Notice of Proposed Rule Making*, WT Docket No. 96-6, 11 FCC Rcd 2445 (1996).

² 47 U.S.C. § 332.

³ Commenters and Reply Commenters are listed in Appendix A and B, respectively.

⁴ We use the term "CMRS spectrum" to refer to the frequency bands licensed to CMRS providers.

2. We therefore amend our rules to allow providers of narrowband and broadband Personal Communications Services (PCS), cellular, CMRS Specialized Mobile Radio (SMR), CMRS paging, CMRS 220 MHz service, and for-profit interconnected business radio services to offer fixed wireless services on their assigned spectrum on a co-primary basis with mobile services. Specifically,

- We conclude that fixed services, excluding broadcast services, are permissible service offerings on spectrum allocated for broadband and narrowband CMRS.
- We modify our CMRS service rules to allow spectrum allocated to these services to be used on a co-primary basis for fixed services, mobile services, or any combination of the two, and we eliminate the classification of fixed services as limited to auxiliary or ancillary uses in these bands.
- We maintain the technical rules currently in place for CMRS and require licensees who wish to offer co-primary fixed services on CMRS spectrum to comply with those rules.
- We refer universal service issues that may arise from our decisions in this Report and Order to the Commission's pending universal service proceeding, CC Docket No. 96-45.⁵

3. These rule changes will allow CMRS providers greater flexibility to provide innovative wireless services to meet consumer demands. The record in this proceeding and in the testimony presented at our Spectrum *En Banc* hearing⁶ both indicate that CMRS providers, in addition to developing mobile services, are seeking to provide a wide range of fixed service offerings to consumers, and in many instances to combine fixed and mobile technologies into integrated service packages. Potential fixed wireless services include not only "wireless local loop," *i.e.*, fixed wireless links to connect residences, apartment buildings, office buildings and other structures with wireline local exchange networks, but also fixed wireless architectures that can link end users to cellular switches, and remote base stations. By giving CMRS providers greater flexibility to provide these fixed services, whether separately or in combination with mobile services, we establish a framework that will stimulate wireless competition in the local exchange market, encourage innovation and experimentation in development of wireless services, and lead to a greater variety of service offerings to consumers.

4. While we adopt rules allowing licensees to offer fixed services over CMRS spectrum, we determine that it would be premature to make a final determination with respect to the regulatory treatment of licensees providing such services. Therefore, in the *Further Notice of*

⁵ Federal-State Joint Board on Universal Service, *Notice of Proposed Rule Making and Order Establishing Joint Board*, CC Docket No. 96-45, FCC 96-93 (rel. March 8, 1996) [61 Fed. Reg. 10499 (March 14, 1996)].

⁶ The Spectrum *En Banc* was held on March 5, 1996. The hearing consisted of four panels and addressed such issues as future spectrum demand and technology trends. We incorporate the written submissions and oral testimony from the *En Banc* Hearing into the record of this proceeding.

Proposed Rule Making, we seek additional comment on the regulatory treatment of entities offering fixed services on CMRS spectrum:

- We do not intend to alter the regulatory treatment of licensees offering the types of ancillary, auxiliary, and incidental fixed services that have been offered by CMRS providers under our rules prior to this order
- We propose to establish a presumption that licensees offering other fixed services over CMRS spectrum should be regulated as CMRS. We seek comment on such a presumption and, if adopted, what factors should be used to support or rebut this presumption.

II. BACKGROUND

5. Our current rules for CMRS services allow licensees to provide all forms of mobile services on their assigned spectrum. The Communications Act, as amended, defines "mobile service" as a "radio communication service carried on between mobile stations or receivers and land stations, and by mobile stations communicating among themselves."⁷ In the *CMRS Second Report and Order*, the Commission interpreted the statutory definition of mobile service to include "all auxiliary services provided by mobile services licensees."⁸ This enables parties licensed to provide service over CMRS spectrum to provide some forms of fixed services on their assigned spectrum. Our PCS rules, for example, permit PCS licensees to provide any fixed service that is "ancillary" to their mobile operations.⁹ Likewise, SMR providers may use licensed spectrum for certain fixed uses on a secondary, non-interference basis to the primary mobile operations of any other licensee.¹⁰ Cellular carriers may provide "auxiliary" common carrier

⁷ 47 U.S.C. § 153(27) (formerly § 153(n)).

⁸ Implementation of Sections 3(n) and 332 of the Communications Act, GN Docket No. 93-252, *Second Report and Order*, 9 FCC Rcd 1411, 1424-1425 (1994) ("*CMRS Second Report and Order*"); see also 47 C.F.R. §20.7.

⁹ See 47 C.F.R. § 24.3; see also Amendment of the Commission's Rules to Establish New Personal Communications Service, GEN Docket no. 90-314, *Second Report and Order*, 8 FCC Rcd 7700, 7712.

¹⁰ See, Amendment of Part 90 of the Commission's Rules to Permit Secondary Fixed Tone Signalling and Alarm Operations by End Users of Trunked SMR Systems, PR Docket No. 86-78, *Report and Order*, 1 FCC Rcd 926 (1986); Amendment of Part 90 of the Commission's Rules to Permit Exclusive-Use Systems to Conduct Secondary Fixed Signaling and Alarm Operations without Conforming to the Provision of Section 90.235, PR Docket No. 91-322, *Report and Order*, 7 FCC Rcd 4574 (1992); see also 47 C.F.R. § 90.317.

services and services premised on the use of alternative cellular technologies, provided such services do not interfere with cellular service.¹¹

6. These current rules were intended to offer some flexibility to licensees providing CMRS services who seek to provide fixed services that complement or support their mobile service offerings. In the PCS context, for example, we have consistently stated that we envisioned PCS providers offering a broad array of services, including services that could potentially extend, replace, and compete with wireline local exchange service.¹² These services, including "wireless local loop," may be delivered using a system architecture that is mobile or fixed, or that combines mobile and fixed components.¹³

7. The current rules also place some limits on the ability of licensees on CMRS spectrum to offer fixed services, however. In reviewing the definition of "mobile service" under the Communications Act, "we have concluded that services having both fixed and mobile capabilities, e.g., services provided through dual-use equipment, fall within the statutory definition."¹⁴ In contrast, we have concluded that services that are solely fixed in nature, e.g., fixed point-to-point services such as Basic Exchange Telephone Radio Service (BETRS), do not constitute "mobile service" within the meaning of the statute.¹⁵ The current rules do not allow fixed services to be offered on spectrum allocated for PCS or other CMRS unless they are ancillary to or in support of mobile service offerings, or unless the carrier obtains a waiver allowing it to offer primarily fixed service.¹⁶ The rationale for prohibiting non-ancillary fixed uses of the spectrum has been that the amount of spectrum available for the development of new mobile services such as PCS is limited and that alternative spectrum is available for fixed services.¹⁷

¹¹ See Amendment of Parts 2 and 22 of the Commission's Rules to Permit Liberalization of Technology and Auxiliary Service Offerings in the Domestic Public Cellular Radio Telecommunications Service, GEN Docket No. 87-390, *Report and Order*, 3 FCC Rcd 7033 (1988); see also 47 C.F.R. § 22.901.

¹² See Amendment of the Commission's Rules to Establish New Personal Communications Services, GEN Docket No. 90-314 and ET Docket No. 92-100, *Notice of Proposed Rule Making and Tentative Decision*, 7 FCC Rcd 5676, 5681, ¶ 10 (1992).

¹³ Mobile service is one that allows the end user to communicate while moving or from different locations. Fixed service requires the end user to be at a set location. See 47 U.S.C. § 153(27); 47 C.F.R. § 2.1.

¹⁴ *CMRS Second Report and Order*, para. 38.

¹⁵ *Id.*

¹⁶ See Allocation of Spectrum Below 5 GHz Transferred from Federal Government Use, ET Docket 94-32, *First Report and Order and Second Notice of Proposed Rule Making*, 10 FCC Rcd 4769, 4781 (1995).

¹⁷ Amendment of the Commission's Rules to Establish New Personal Communications Services, GEN Docket No. 90-314, *Second Report and Order*, 8 FCC Rcd 7700, 7712 (1993).

8. The limitations in our rules governing provision of fixed services on PCS and other CMRS spectrum have caused uncertainty among carriers. Although terms such as "ancillary," "auxiliary," and "incidental" are intended to provide licensees who offer CMRS services with flexibility, these terms are not defined in the rules and have been subject to varying interpretations. As a result of this lack of clarity, we have found that carriers are hesitant to take advantage of the flexibility allowed by the current rules to explore potential flexible uses of their spectrum without further guidance from the Commission. In addition, carriers have indicated interest in obtaining greater flexibility than the current rules may allow to provide fixed wireless services as a competitive alternative to wireline or mobile wireless service.

9. The Commission has also recently taken actions in several other proceedings to increase the licensee's flexibility in choosing what services to provide. In creating the General Wireless Communications Service (GWCS), the Commission authorized use of the 4660-4685 MHz band to provide mobile or fixed services or a combination of the two.¹⁸ Similarly, the Commission has stated that Multipoint Distribution Service (MDS) stations may render any kind of communications service on a common carrier or non-common carrier basis.¹⁹ The Commission has also proposed to allow fixed operations on a primary basis with land mobile operation in the 220-222 MHz band.²⁰

IV. FIRST REPORT AND ORDER

A. Flexible Use of CMRS Spectrum

10. Background. We sought comment in the *Notice* on alternative approaches to allowing PCS and other CMRS providers more flexibility to offer fixed services, including: (1) adopting a rule that would expressly allow CMRS providers to offer "fixed wireless local loop," (2) permitting CMRS providers to offer wireless local loop and other defined fixed services, or (3) allowing CMRS providers to offer any form of fixed service without restriction. In the *Notice* we proposed to apply whatever increased flexibility we granted to broadband CMRS services,²¹

¹⁸ Allocation of Spectrum Below 5 GHz from Federal Government Use, 4660-4685 MHz, ET Docket No. 94-32, *Second Report and Order*, 11 FCC Rcd 624, 672 (1995).

¹⁹ Amendment of Parts 21 and 74 of the Commission's Rules with Regard to Filing Procedures in the Multipoint Distribution Service and in the Instructional Fixed Television Fixed Service, MM Docket No. 94-131, *Report and Order*, 10 FCC Rcd 9589, 9619 (1995).

²⁰ Amendment of Part 90 of the Commission's Rules to provide for the Use of the 220-222 MHz Band by the Private Land Mobile Radio Service, PR Docket No. 89-522, *Second Memorandum Opinion and Order and Third Notice of Proposed Rule Making*, 11 FCC Rcd 188, 226-28 (1995).

²¹ We defined broadband CMRS to include broadband PCS, cellular and SMR service. *Notice* at ¶ 1.

and sought comment on whether narrowband CMRS services should also have such increased flexibility.²²

11. Comments. An overwhelming majority of the commenters support amending our rules to allow all CMRS providers to offer all types of fixed wireless services without restriction. Most commenters agree that the Commission's current rules are unclear regarding the extent to which various broadband CMRS providers may offer fixed services. These commenters argue that the Commission should amend its rules to allow fixed services to be provided on CMRS spectrum on a co-primary basis rather than being limited to ancillary or auxiliary uses. Commenters contend that allowing carriers greater flexibility to provide fixed services will lead to more innovation and diversity of service offerings, additional competition in the local exchange market, expanded use of wireless services in areas that have traditionally not been served by wireline carriers, and competitive prices and enhanced choice for consumers.

12. Commenters who favor flexibility also oppose limiting the definition of permissible fixed service to wireless local loop, on the grounds that such a limitation would inhibit the development and deployment of technology, make it difficult for wireless providers to meet consumer demand, and create unnecessary confusion.²³ PCIA contends that granting licensees the authority to provide all fixed services on spectrum allocated for CMRS avoids the expenditure of both Commission and service provider resources on defining "wireless local loop" and interpreting that definition.²⁴ PCIA further reasons that if wireless local loop service is permitted and other fixed services are not, licensees may engage in technical or legal contortions in order to fit their fixed service offerings into the "wireless local loop" definition.²⁵ Bell Atlantic argues that, to the extent that existing rules create uncertainty because they employ different terms in authorizing fixed service by different types of CMRS providers, the Commission should eliminate that uncertainty by stating that any CMRS provider may offer fixed services provided that the two longstanding requirements are met: mobile service continues to be offered; and the fixed service does not interfere with the provision of mobile service.²⁶

13. Most commenters also contend that allowing carriers maximum flexibility to provide fixed as well as mobile service will not have a negative impact on the availability of spectrum to provide mobile service. Telular argues that there is no longer any regulatory need to ensure that sufficient spectrum will be available for mobile services in addition to fixed services because

²² We defined narrowband CMRS as paging, narrowband PCS, commercial 220 MHz service, and for-profit interconnected business radio service. *Notice* at ¶ 18.

²³ AT&T Reply Comments at 4.

²⁴ PCIA Comments at 6.

²⁵ *Id.*

²⁶ Bell Atlantic Comments at 4.

a highly competitive emerging marketplace will ensure that licensees service the public efficiently.²⁷ AT&T points out that it is likely that CMRS providers who have invested billions of dollars in mobile facilities will retain the primary mobile character of their offerings.²⁸ CTIA states that the market will ensure that spectrum licensed for CMRS services will be used for fixed services only when it is efficient to do so.²⁹ Omnipoint notes that a consensus in favor of allowing the market to decide the best use of available CMRS spectrum is evident, and this approach seems most consistent with the Telecommunications Act of 1996's (1996 Act)³⁰ emphasis on deregulation and competition.³¹ Celpage notes that consumer demand for mobile services is increasing and CMRS providers will not ignore consumer demands.³² Celpage also argues that fixed and mobile uses of CMRS spectrum are complementary rather than mutually exclusive, so that allowing a single carrier to provide both types of service will result in greater conveniences and cost savings to the public.³³

14. Commenters also generally support extending flexibility to all CMRS bands, including both broadband and narrowband services.³⁴ AMTA argues that creating fixed service flexibility only for a certain portion of CMRS spectrum, such as PCS, makes no sense in light of the FCC's entire regulatory program for wireless services.³⁵ AT&T agrees that in light of the regulatory objectives of Section 332 of the Communications Act, similar treatment should be afforded all categories of CMRS that have the potential to compete with PCS.³⁶

15. A few commenters, however, disagree with the proposals set forth in the *Notice*. BANM opposes the rule changes because it believes that they are not needed.³⁷ BANM claims

²⁷ Telular Comments at 9.

²⁸ AT&T Comments at 4.

²⁹ CTIA Comments at 4.

³⁰ Pub. L. No. 104-104, 110 Stat. 56 (1996).

³¹ Omnipoint Reply Comments at 3.

³² Celpage Comments at 4.

³³ Celpage Comments at 5.

³⁴ 360 Degrees Comments at 1, Frontier Comments at 2, Worldcom Comments at 2, Motorola Comments at 2. Worldcom notes that increased competition can help bring down access rates of incumbent LECs to the ultimate benefit of the end user.

³⁵ AMTA Comments at 5.

³⁶ AT&T Comments at 6.

³⁷ BANM Comments at 2.

that fixed services are a fledgling business for CMRS providers and that few, if any, are offering what the *Notice* describes as wireless local loop service. Accordingly, BANM argues that there is no rationale to examine possible changes to the *status quo* at this time.³⁸ Comcast believes the Commission should clarify that all auxiliary services provided by mobile services licensees are within the definition of "mobile service" without using a *Notice*.³⁹ RCC notes that the proposals set forth in the *Notice* merely clarify types of service which cellular licensees already are authorized to provide.⁴⁰

16. PCS One opposes the Commission's proposal to allow cellular licensees to provide fixed wireless services.⁴¹ PCS One argues that the Commission must permit PCS, for at least a reasonable interval, greater flexibility than cellular in the use of its spectrum. According to PCS One, this is necessary in order to establish a more level playing field while PCS enters the marketplace and attempts to establish itself against the entrenched cellular operators.⁴² Omnipoint supports operational flexibility for PCS providers, arguing that PCS offerings will change over time as operators build-out their systems, new technology changes PCS capabilities, and additional competition further invigorates the local exchange market.⁴³ PacTel and UTC believe that, if the Commission makes a distinction among CMRS providers, PCS licensees should have the greatest flexibility because they received their licenses through the auction process.

17. Discussion. The record supports our observation in the *Notice* that sufficient uncertainty exists in our current rules to warrant clarification with regard to the provision of fixed services over spectrum allocated for CMRS. Rather than continuing to define allowable fixed services in terms of whether they are "ancillary," "auxiliary," or "incidental" to mobile services, we conclude that our rules should more broadly allow fixed services to be provided on a co-primary basis with mobile services.

18. As a threshold matter, we note that the record in this proceeding strongly supports our proposal to encourage the provision of fixed services by licensees operating in the CMRS bands. Commenters have provided several examples of potential applications of fixed wireless technology. For example, fixed wireless systems can be imbedded into PBXs and local area networks to permit continued service even when wireline service is interrupted due to weather

³⁸ *Id.*

³⁹ Comcast Comments at 2.

⁴⁰ RCC Comments at 3.

⁴¹ PCS One Comments at 2.

⁴² *Id.* PCS One argues that this is especially important in light of the fact that PCS licensees had to pay for their licenses in auctions, and also have to pay to relocate incumbents.

⁴³ Omnipoint Comments at 1.

or other emergencies.⁴⁴ Call routing may become more efficient by allowing CMRS providers to offer fixed wireless services.⁴⁵ Omnipoint suggests that fixed wireless links could be used to provide "local loop" to apartment buildings, office buildings, and older homes where rewiring costs are high.⁴⁶ Nortel envisions a variety of "fixed wireless access" services coming into homes and residences that would provide an alternative to end-to-end wiring by the carrier from the switch to the end user.⁴⁷

19. We agree with the many commenters that support the Commission's proposal to allow CMRS providers to offer fixed wireless services. We believe that the public interest is better served by not attempting to limit potential use of CMRS spectrum to specific applications. We agree with SBC Communications that imposing such a limitation could lead to difficult definitional questions about what constitutes "wireless local loop" or other defined services.⁴⁸ For example, Nortel's concept of fixed wireless access includes not just low-power wireless "drops" from the street to the home, but also fixed wireless architectures that would link end users to the public switched network through cellular switches, and remote base stations (in rural areas).⁴⁹ If we were to restrict fixed service to certain configurations, Nortel and other carriers might be reluctant to pursue some potentially efficient options out of concern that they would be considered to fall outside the definition of our prescribed service definition. Rather than limit the flexibility of carriers in this manner, we prefer to encourage innovation and experimentation through a broader, more flexible standard.

20. Additional support for this approach comes from the Commission's *en banc* hearing on spectrum policy, held on March 5, 1996.⁵⁰ In written and oral testimony before the Commission, a number of participants in the hearing stressed the importance of allowing CMRS providers the flexibility to offer fixed wireless services. Northern Telecom, for example, noted that local access competition will stimulate a rapid demand for fixed wireless service, and encouraged the Commission to give wireless operators service flexibility to respond to user

⁴⁴ Telular Comments at 3.

⁴⁵ RCC Comments at 4.

⁴⁶ Omnipoint Comments at 5.

⁴⁷ *Ex parte* presentation by Northern Telecom to the Wireless Telecommunications Bureau on Fixed Wireless Access on May 14, 1996 (Nortel Presentation).

⁴⁸ SBC Communications Comments at 3.

⁴⁹ *Nortel presentation*.

⁵⁰ The hearing consisted of four panels and addressed such issues as future spectrum demand and technology trends. We incorporate the written submissions and oral testimony from the *En Banc* Hearing into the record of this proceeding.

demands.⁵¹ The National Association of Broadcasters agreed that allowing greater flexibility for CMRS providers would have significant public interest benefits by stimulating competition between wireless and wireline telephony.⁵² Freedom Technologies, Inc., testified that allowing greater flexibility in spectrum use is consistent with the Commission's responsibility to ensure the efficient use of spectrum.⁵³ On a panel concerning technology trends, COM21 asserted that rules promoting flexible use of spectrum will create incentives for the development of better sharing technologies.⁵⁴ AirTouch submitted that flexibility should be an integral part of spectrum policy because such flexibility increases innovation and competition, and helps to ensure that spectrum is devoted to its highest and best uses.⁵⁵

21. In the *Notice*, we sought comment on whether allowing CMRS providers to provide fixed services without restriction could result in limiting capacity for mobile services. In that regard, we observed that current technology supports use of spectrum to provide mobile service only below the 3 GHz band, while fixed uses are feasible on higher bands.⁵⁶ Based on the record, we conclude that this need not be a concern. First, with the advent of PCS and other new CMRS services, we have significantly increased the amount of spectrum available for mobile services over what was available previously. Second, carriers are using advanced technology. As Sprint Spectrum and US West point out, development of digital technology has led to increases in potential CMRS spectrum capacity by a factor of ten, and those technologies are likely to improve dramatically in the future.⁵⁷ Third, nothing in the record suggests that giving licensees who provide CMRS services the flexibility to offer fixed service would make them less responsive to market demand for mobile service. In fact, the record indicates that most carriers intend to offer consumers integrated packages and combinations of mobile and fixed services.

22. For these reasons, we conclude that licensees should have maximum flexibility to provide fixed or mobile services or combinations of the two over spectrum allocated for CMRS services, including PCS, cellular, and SMR services. We agree with the majority of commenters that limitations on fixed uses are unnecessary because the market is the best predictor of the most

⁵¹ Testimony of David Twyver, President, Wireless Networks, Northern Telecom, March 5, 1996, at 3.

⁵² Testimony of Lynn D. Claudy, Senior Vice President, Science and Technology, National Association of Broadcasters, Spectrum En Banc Hearing, March 5, 1996, at 2.

⁵³ Testimony of Charla M. Rath, Freedom Technologies, Inc., "*Flexibility in Spectrum Allocation and Use: Achieving Efficient Use of Spectrum*," March 5, 1995, at 8.

⁵⁴ Testimony of Mr. Paul Baran, Chairman of Com21, Inc., submitted by CTIA, March 5, 1996.

⁵⁵ Testimony of F. Craig Farrill, on behalf of AirTouch Communications, March 5, 1996, at 1 (Summary of Statement).

⁵⁶ *Id.*, paras. 14, 17, 25.

⁵⁷ Sprint Spectrum Comments at 3, note 6, US West Comments at 3.

desirable division of this spectrum. In light of the dynamic, evolving nature of the wireless industry, we are concerned that regulatory restrictions on use of the spectrum could impede carriers from anticipating what services customers most need, and could result in inefficient spectrum use and reduced technological innovation. Allowing service providers to offer all types of fixed, mobile, and hybrid services in response to market demand will allow for more flexible responses to consumer demand, a greater diversity of services and combinations of services, and increased competition. This is consistent with the goals of the 1996 Act, which seeks to increase competition between the various providers of telecommunications services, including competitive alternatives to traditional local exchange service.⁵⁸ All consumers will also benefit from technological advances in fixed services and fixed/mobile combinations that potentially could be stifled by restrictive service definitions.

23. In the *Notice* we proposed to increase flexibility to provide fixed wireless service for broadband CMRS services -- broadband PCS, cellular, SMR. We sought comment on whether narrowband CMRS services -- paging, narrowband PCS, commercial 220 MHz service and for-profit interconnected Business Radio Service -- should also be permitted greater flexibility to offer fixed wireless services.⁵⁹ We agree with commenters that we should extend the flexibility to offer fixed services to the narrowband services set out in the *Notice* as well as broadband CMRS. In the *CMRS Third Report and Order*, we found that narrowband and broadband CMRS are potentially competitive with one another and should be subject to comparable regulation. We conclude that subjecting narrowband licensees to more stringent regulatory constraints than broadband CMRS providers would be inconsistent with principles of regulatory parity and serves no public interest goal.⁶⁰ By contrast, allowing narrowband CMRS providers to provide fixed services on the same basis as broadband CMRS providers provides incentives for increased innovation, diversity of services, and increased competition. Although there may be technical constraints on the ability to provide fixed service on narrowband channels, we conclude that narrowband licensees should nevertheless be entitled to the regulatory flexibility so that they may take advantage of technological advances that may occur without being required to seek additional changes to the rules. This result is also in keeping with the goals of the 1996 Act to make available the most competitive environment possible for telecommunications services.

⁵⁸ See S. Conf Rep. No. 104-230, 104th Cong., 2d Sess. 1 (1996); see also 47 U.S.C. §§ 251-261.

⁵⁹ We also proposed to modify our rules to allow fixed operation on the 220-222 MHz band on a primary basis in PR Docket No. 89-522. See Amendment of Part 90 of the Commission's Rules to Provide for the Use of the 220-222 MHz Band by the Private Land Mobile Radio Service, PR Docket No. 89-522, *Second Memorandum Opinion and Order and Third Notice of Proposed Rule Making*, 11 FCC Rcd 188, 226-28 (1995). That proceeding also addresses numerous other issues regarding the service rules for the 220-222 MHz band. Our action in this docket on the provision of fixed services by CMRS 220 MHz service providers in that band does not predetermine any action we may take on other issues raised in PR Docket No. 89-522.

⁶⁰ See AirTouch/New Vector Comments at 7; CTIA Comments at 5.

24. For the foregoing reasons, we conclude that service providers using spectrum allocated for CMRS should have the flexibility to provide fixed services on a co-primary basis with mobile services. Thus, service providers could choose to provide exclusively fixed services, exclusively mobile services, or any combination of the two.⁶¹ Accordingly, we modify the language in Section 22.901 of the Commission's rules (cellular service), Section 24.3 of the Commission's rules (PCS), and Section 90.419 of the Commission's rules (SMR) to establish a uniform description of fixed wireless services that may be offered on this spectrum. We adopt the same modifications to our rules governing narrowband CMRS, including paging, narrowband PCS, 220 MHz service, and for-profit interconnected Business Radio Services.⁶²

25. In adopting these modifications, we retain the prohibition on licensees in these services offering broadcast services.⁶³ This prohibition applies regardless of whether licensees are offering fixed or mobile services or a combination of the two. We did not seek comment on this issue in the *Notice*, nor have commenters who favor flexibility suggested that they want or need spectrum to provide broadcast services. In our view, any consideration of whether to alter our rules with respect to allocation of spectrum for broadcast services is beyond the scope of this proceeding. In addition, we note that under applicable international allocation agreements, broadcast use of the spectrum at issue in this proceeding is restricted.⁶⁴ Therefore, we conclude it would be inappropriate to amend our rules in this regard.

B. Technical and Operational Rules

26. Background. In the *Notice*, we sought comment on whether modifications to our technical and operational rules are needed to accommodate fixed uses of CMRS channels if we adopted our tentative conclusions and permitted such uses.⁶⁵ We indicated that our intent is to implement the necessary technical rules in order to minimize interference without unduly hindering a carrier's ability to offer a variety of services.⁶⁶

⁶¹ Cellular carriers are subject to the requirements set out in Sections 22.901 and 22.933 of our rules, to provide cellular mobile service upon request to all cellular subscribers in good standing, except in instances where a cellular provider chooses to provide solely fixed service over its spectrum. See 47 C.F.R. §§ 22.901, 22.933.

⁶² The revisions to Parts 2, 22, 24, and 90 are set forth in Appendix C.

⁶³ Broadcasting is defined in Section 3(6) of the Communications Act, as amended. 47 U.S.C § 3(6). See *Subscription Video, Report and Order*, 2 FCC Rcd 1001-1003-6 (1987).

⁶⁴ See 47 C.F.R. § 2.106.

⁶⁵ *Notice* at ¶¶ 15, 17.

⁶⁶ *Notice* at ¶ 15.

27. Comments. AirTouch/New Vector and SBC claim the Commission should leave existing technical rules intact in order to preserve the current interference-free environment.⁶⁷ SBC argues that fixed services should be engineered so that they operate within their assigned spectrum and do not interfere with other carriers operating on their assigned spectrum.⁶⁸ Nextel requests that, with regard to fixed services provided by SMR licensees, the Commission should apply all of the existing Part 90 technical standards to fixed SMR services as well as mobile SMR services. Nextel contends that Part 90 SMR co-channel protection and interference standards must be applied to fixed services along with mobile services to prevent harmful interference among co-channel operators.⁶⁹ However, AirTouch/New Vector cautions against imposing stricter technical standards on the provision of fixed service that could result in onerous retrofitting requirements for carriers with operational wireless systems.⁷⁰

28. Several parties also request specific changes to technical rules. PacTel requests that the Commission exempt in-home PCS base stations operating at 100 milliwatts or less from the requirement in Section 24.237 that base stations must undergo interference analysis and coordination with incumbents before being made operational.⁷¹ RCC and SR Telecom support modification of certain cellular rules to permit mobile stations to communicate with "wireless local loop" equipment.⁷²

29. Discussion. The comments that we received regarding the technical rules indicate that we should maintain the technical rules that are currently in place and require CMRS providers who wish to offer co-primary fixed services to comply with those rules. We agree with SBC that fixed services should be engineered so that they conform to our existing interference rules and do not interfere with the operations of co-channel or adjacent channel carriers providing mobile service. Thus, so long as out-of-band and co-channel/frequency-block criteria are met, base stations used to support fixed services may operate at the same maximum power levels as base and mobile stations on the same frequencies. We also decline to adopt the specific rule changes proposed by PacTel relating to in-home base stations. The issue raised by PacTel is outside the scope of this proceeding. We will also defer consideration of the cellular rule changes requested by RCC and SR Telecom. We intend to consider technical concerns regarding CMRS,

⁶⁷ AirTouch/New Vector Comments at 8, SBC Comments at 4

⁶⁸ SBC Comments at 4-5

⁶⁹ Nextel Comments at 3

⁷⁰ AirTouch/New Vector Comments at 9.

⁷¹ PacTel Comments at 5. *See also* letter from Betsy Stover Granger, Pacific Bell Mobile Services, to Michele Farquhar, FCC (dated May, 8, 1996); letter from Wayne V. Black, Keller and Heckman, counsel for American Petroleum Institute, to Michele Farquhar, FCC (dated June 6, 1996).

⁷² RCC Comments at 7; SR Telecom Comments at 12

including those discussed above, in future proceedings that will more broadly address conforming our technical rules for CMRS providers.⁷³

C. Table of Frequency Allocations

30. Background. The *Notice* included proposed changes to the Table of Frequency Allocations to include fixed service as a primary service offering in conjunction with the proposals set forth in the *Notice*. In the *Notice*, we proposed to amend the domestic Table of Frequency Allocations for the 806-821, 851-866, 896-901, and 935-940 MHz bands to permit them to make use of the allocations for both fixed and mobile services on a co-primary basis.⁷⁴

31. Comments. Motorola requests that the Commission modify the Table of Frequency Allocations to make it consistent with the Commission's proposal to allow cellular providers to offer both fixed and mobile services.⁷⁵ SR Telecom supports Commission proposal to amend the Table of Frequency Allocations.⁷⁶

32. Discussion. We will amend the Table of Frequency Allocations as proposed in the *Notice* to permit licensees to make use of the affected allocations for both fixed and mobile services on a co-primary basis. In modifying the Table of Frequency Allocations, we will comply with Motorola's request and clarify that the Table applies to the fixed wireless services we are now allowing licensees to offer.

33. Specifically, we allocate the 27.41-27.54, 30.56-32, 33-34, 35-36, 42-43.69, 150.8-152.855, 154-156.2475, 157.45-161.575, 220-222,⁷⁷ 454-455, 456-462.5375, 462.7375-467.5375, 467.7375-512, 806-821, 824-849, 851-866, 869-894, 896-901, 929-930, 931-932 and 935-940 MHz bands to the fixed service on a co-primary basis.⁷⁸ In addition, we delete footnotes US330

⁷³ See, e.g., Amendment of Part 90 of the Commission's Rules to Provide for the Use of the 220-222 MHz Band by the Private Land Mobile Radio Service, PR Docket No. 89-522, *Second Memorandum Opinion and Order and Third Notice of Proposed Rule Making*, 11 FCC Rcd 188 (1995).

⁷⁴ *Notice* at ¶ 26.

⁷⁵ Motorola Comments at 9.

⁷⁶ SR Telecom Comments at 17.

⁷⁷ The 220-222 MHz band is shared Government/non-Government spectrum. During our consultations with NTIA regarding this band, the Commission and NTIA agreed to allocate the 220-222 MHz band to the fixed service on a co-primary basis for both Government and non-Government operations. Accordingly, the fixed service is also added to the Government column in the 220-222 MHz band on a co-primary basis.

⁷⁸ The narrowband and broadband PCS spectrum (901-902, 930-931, 940-941 and 1850-1990 MHz) is already allocated to the fixed service on a co-primary basis.

and US331, which prohibited narrowband and broadband PCS licensees from providing fixed services, except for ancillary fixed services used in support of mobile PCS.

34. As an editorial matter, we are converting the format of the Table of Frequency Allocations so that the individual frequency bands are represented as blocks of uniform size, in accordance with a request made by the Federal Register. Further, we are updating the international table of the Table of Frequency Allocations to reflect the Final Acts of the 1992 World Administrative Radio Conference.⁷⁹ Additionally, we are removing international footnote 613 from the 157.45-158.115 MHz band and footnote NG153 from the 849-851 and 894-896 MHz bands, which are bands to which these footnotes do not apply. With regard to the rule part cross references, we are updating the title of Part 22 to Public Mobile (from Domestic Public Land Mobile) in the 35.19-35.69, 43.19-43.69, 152-152.255, 152.495-152.855, 157.755-162.0125, 454-455, 459-460, 470-512, 824-849, 869-894, 928-929, 931-932 and 944-960 MHz bands; displaying the rule parts in the 173.2-173.4 and 1850-1990 MHz bands in capital letters to indicate that the allocations in these bands are on a primary basis; updating the PCS rule part to Part 24 (from Part 99) in the 901-902, 930-931 and 940-941 MHz bands; adding Part 22 to the 851-866 MHz band, Parts 22 and 101 to the 932-935 and 941-942 MHz bands, and Part 101 in the 942-944 MHz band; replacing Part 94 with Part 101 in the 928-929, 944-960 and 1850-1990 MHz bands; and deleting Satellite Communications (25) from the 450-451 MHz band, Domestic Public Land Mobile (22) from the 929-930 MHz band and Private Land Mobile (90) from the 931-932 MHz band. Finally, we are revising the Government column in the 30-30.56 MHz band by displaying the fixed service as a primary -- not secondary -- allocation; correcting typographical errors in the 42-43.19 MHz band for columns 4 through 6; and adding footnotes US116, US215, US268 and G2 to the Government column in the 928-932 MHz band.⁸⁰

D. Universal Service Obligations

35. Background. In the *Notice*, we concluded that should we ultimately adopt the proposed rules, licensees would be permitted to provide fixed wireless local loop services on spectrum allocated for CMRS services that in some respects could be similar to wireline telephone local exchange service.⁸¹ We sought comment, therefore, on the extent to which any of our universal service programs should be modified to encompass, or impose obligations on, CMRS providers that offer the equivalent of local exchange service. We also noted that it is the

⁷⁹ See International Telecommunication Union's *Final Acts of the World Administrative Radio Conference for Dealing with Frequency Allocations in Certain Parts of the Spectrum (WARC-92)*, Malaga-Torremolinos, 1992, ISBN 92-61-04661-4. We intend to update the international table to reflect the Final Acts of the 1995 World Radiocommunication Conference in a separate rulemaking.

⁸⁰ See *Manual of Regulations and Procedures for Federal Radio Frequency Management*, September 1995 Edition, Chapter 4 at pages 35, 37 and 52. The 30-30.56 MHz band is exclusive Government spectrum.

⁸¹ *Notice* at ¶ 21.

Commission's preference to consider the universal service obligation issues raised in this proceeding in our decisions in the universal service proceedings.⁸²

36. Subsequent to the release of the *Notice*, the Telecommunications Act of 1996 was enacted. The 1996 Act, among other things, amends the Communications Act to include a provision regarding Universal Service, and establishes a Federal-State Joint Board to recommend change to the Commission's universal service rules to implement the 1996 Act.⁸³ In March the Commission issued a *Notice of Proposed Rule Making and Order Establishing Joint Board* to implement the universal service provisions of the 1996 Act.⁸⁴

37. Comments. Many parties agree with the Commission that these issues should be addressed in the ongoing Universal Service proceeding.⁸⁵ Omnipoint and US West argue that the complex universal service issues have not been fully explored in the *Notice*, and consideration of those issues in this proceeding will likely impede the swift regulatory changes that are needed.⁸⁶ PCIA notes that the *Notice* is linked to the universal service and subscribership proceedings because it is intended to increase competition for the provision of local exchange service.⁸⁷

38. Discussion. We agree that it would be premature to address in this Report and Order whether universal service requirements should be extended to CMRS providers offering fixed wireless service. It is also apparent both from our experience with universal service issues and the comments in response to the *Notice* that the public interest would be better served by allowing the Joint Board to address the universal service issues raised in this proceeding. Thus, we defer discussion of the proposals discussed by commenters in response to the *Notice* for consideration by the Joint Board in CC Docket No. 96-45

⁸² *Notice* at ¶ 21.

⁸³ *See* 47 U.S.C. § 254.

⁸⁴ Federal-State Joint Board on Universal Service, *Notice of Proposed Rule Making and Order Establishing Joint Board*, CC Docket No. 96-45, FCC 96-93 (rel. March 8, 1996).

⁸⁵ 360 Degrees Comments at 3, BellSouth Comments at 4, NTCA Comments at 4, Nextel Comments at 4, Omnipoint Comments at 9, PacTel Comments at 3, PCIA Comments at 11-12, SBC Comments at 6, Western Wireless Comments at 9, US West Comments at 9, Sprint Corp Comments at 3

⁸⁶ Omnipoint Comments at 9, US West Comments at 9. *See also*, Omnipoint Reply Comments at 12.

⁸⁷ PCIA Comments at 13

E. Regulatory Treatment of Fixed Services

39. For the reasons discussed below, we conclude that further development of the record is needed to resolve the issue of how fixed services allowed by this Report and Order should be regulated. Therefore, we address this issue in the *Further Notice of Proposed Rule Making* below.

IV. FURTHER NOTICE OF PROPOSED RULE MAKING

40. Background. In the *Notice*, we sought comment on how we should regulate any fixed service offered by licensees on CMRS spectrum.⁸⁸ We noted that, for example, PCS providers intend to integrate mobile, fixed wireless, wireline, and cable facilities into seamless service offerings. We stated that we do not want to discourage development of such integrated networks by subjecting carriers to multiple layers of regulation, and therefore proposed to treat fixed wireless services as an integral part of CMRS services offered by a CMRS provider, so long as the carrier otherwise uses CMRS spectrum to offer interconnected mobile service to the public for profit.⁸⁹ We requested comment on that proposal and invited commenters to offer alternative proposals.

41. In Section 332, Congress defined "commercial mobile service" as "any mobile service (as defined in section 3 [Section 153]) that is provided for profit and makes interconnected service available (A) to the public or (B) to such classes of eligible users as to be effectively available to a substantial portion of the public as specified by regulation by the Commission."⁹⁰ At the same time, Congress amended the definition of "mobile service" by adding two new clauses, designated as (B) and (C) which include a reference to PCS service.⁹¹ "Mobile service" is defined in Section 153(27) as "radio communication service carried on between mobile stations or receivers and land stations, and by mobile stations communicating among themselves, and includes (A) both one-way and two-way radio communication services, (B) a mobile service which provides a regularly interacting group of base, mobile, portable, and associated control and relay stations (whether licensed on an individual, cooperative, or multiple basis) for private one-way or two-way land mobile radio communications by eligible users over designated areas of operation, and (C) any service for which a license is required in a personal communications service established pursuant to the proceeding entitled 'Amendment to the Commission's Rules

⁸⁸ *Notice* at ¶ 19.

⁸⁹ *Id.* at ¶ 20.

⁹⁰ 47 U.S.C. § 332(d)(1).

⁹¹ Omnibus Budget Reconciliation Act of 1993 (Budget Act), Pub. L. No. 103-66, Title VI, § 6002(b), 107 Stat. 312 (enacted August 10, 1993).

to Establish New Personal Communications Services' (GEN Docket No. 90-314; ET Docket No. 92-100), or any successor proceeding."⁹²

42. Section 332 provides that CMRS providers are to be treated as common carriers, but allows the Commission authority to forbear from applying certain sections of Title II.⁹³ In the *CMRS Second Report and Order*, the Commission determined that it would be in the public interest to forbear from imposing most Title II requirements on CMRS providers, including tariffing requirements.⁹⁴ Section 332 also preempts state regulation of rates and entry for CMRS, but allows the states to petition the Commission for authority to regulate rates in limited circumstances.⁹⁵

43. Comments. Many commenters concur with the Commission's proposal to treat fixed wireless service as an integral part of CMRS services.⁹⁶ RCC and Omnipoint contend that this regulatory scheme is consistent with the framework established by the *CMRS Second Report and Order* that all auxiliary services provided by mobile licensees be included in the definition of CMRS.⁹⁷ 360 Degrees maintains that the policy should apply to all CMRS providers equally, pursuant to the Budget Act, which, according to 360 Degrees, dictates that all CMRS providers should have similar regulatory treatment.⁹⁸ AT&T and GO argue that the prospect of complying with a new regulatory scheme would also discourage providers from quickly altering the nature of their services to meet demand.⁹⁹ GO further argues that, in order for PCS providers to offer

⁹² 47 U.S.C. § 153(27).

⁹³ Specifically, the Commission may forbear from applying any section of Title II, except Sections 201, 202, and 208. 47 U.S.C. § 332(c)(1)(A).

⁹⁴ Implementation of Sections 3(n) and 332 of the Communications Act, Regulatory Treatment of Mobile Service, GN Docket No. 93-252. *Second Report and Order*, 9 FCC Rcd 1411, 1463-93.

⁹⁵ The Commission must grant a State's petition for authority to regulate rates if the state can demonstrate that "(i) market conditions with respect to such services fail to protect subscribers adequately from unjust and unreasonable rates or rates that are unjustly or unreasonably discriminatory; or (ii) such market conditions exist and such service is a replacement for land line telephone exchange service for a substantial portion of the telephone land line exchange service within such State." 47 U.S.C. § 332(c)(3).

⁹⁶ See, e.g., GO Comments at 6, SBC Comments at 5; SMR Systems/Digital Comments at 3; Sprint Spectrum Comments at 4; Telular Comments at 9; Western Wireless Comments at 4, US West Comments at 7; Sprint Corp. Comments at 3; AirTouch Reply Comments at 2; PCS PrimeCo Reply Comments at 4.

⁹⁷ RCC Comments at 7 note 18, Omnipoint Reply Comments at 7, note 19.

⁹⁸ 360 Degrees Comments at 2.

⁹⁹ AT&T Comments at 10, GO Comments at 7.

a seamless package of services, both the mobile and fixed aspects of the service must receive identical regulatory treatment.¹⁰⁰

44. Several parties also address the effect of the passage of the 1996 Act on the possible regulation of fixed wireless services provided by CMRS providers.¹⁰¹ RCC notes that adoption of the proposals in the *Notice* is consistent with the directive in the 1996 Act to provide for a pro-competitive, de-regulatory national policy framework for telecommunications.¹⁰² Omnipoint notes that the 1996 Act specifically excludes CMRS providers from the definition of local exchange carriers, indicating that Congress intended not to subject CMRS operators who want to compete in the local loop to the same regulatory treatment as wireline LECs until such time as CMRS operators displace a significant part of local wireline service.¹⁰³ Ameritech, on the other hand, argues that the inclusion of language in the definition of local exchange carrier giving the Commission authority to classify CMRS providers as LECs means that, to the extent CMRS providers provide wireless local loop, they should bear all the obligations placed on LECs under the Act.¹⁰⁴ Worldcom agrees that if a CMRS provider is the providing fixed wireless local loop services, it should fall within the definition of local exchange carrier.¹⁰⁵

45. Cole Raywid argues that the proposal in the *Notice* to clarify and broaden the permissible use of CMRS providers' licenses to include fixed wireless services in no way affects the statutory prohibition against state and local rate and entry regulation of CMRS providers.¹⁰⁶ The NARUC opposes the expansion of the definition of CMRS to include fixed wireless local loop services.¹⁰⁷ NARUC contends that the Commission's proposal would affect facilities currently subject to State commission jurisdiction both directly and indirectly.¹⁰⁸ NARUC asserts that allowing CMRS providers to offer fixed service would promote a "Federal policy that is not technology neutral and has the impact of deployment of one technology over another."¹⁰⁹

¹⁰⁰ GO Comments at 7

¹⁰¹ The 1996 Act was enacted on February 8, 1996, after the *Notice* was released but before comments were scheduled to be filed.

¹⁰² RCC Comments at 4.

¹⁰³ Omnipoint Reply Comments at 7, note 21.

¹⁰⁴ Ameritech Comments at 6-7.

¹⁰⁵ Worldcom Comments at 8

¹⁰⁶ Cole, Raywid Comments at 7.

¹⁰⁷ NARUC Comments at 2

¹⁰⁸ *Id.* at 2-3.

¹⁰⁹ US West Reply Comments at 4, *citing* NARUC Comments at 4

NARUC argues that state regulation of CMRS and wireline services differs significantly; thus, if the Commission's proposals are adopted, the impact will be to favor a particular technology (wireless) for local access.¹¹⁰ NARUC also argues that the Commission's proposed regulatory scheme contradicts prior decisions excluding fixed wireless services such as BETRS from the definition of mobile services.¹¹¹

46. Discussion. Many CMRS commenters urge the Commission to apply uniform regulatory treatment to all fixed and mobile services offered by carriers on CMRS spectrum. The record suggests, however, that under the flexible service rules we adopt today there may be a variety of different uses of fixed wireless technology by CMRS providers, some of which may raise distinct regulatory issues. For example, some carriers may choose to develop dual-use technology that is capable of being used either in a mobile or a fixed mode. Others may develop fixed wireless local loop architecture to provide service to end users in residences and offices, but combine the fixed wireless service with mobile service options available to the user when the user is outside the home or office. Other carriers may elect to use blocks of spectrum primarily or even solely for fixed interconnected services as a way of entering into direct competition with wireline local exchange carriers.

47. Based on our review of the record in this proceeding, we believe it is premature to attempt a final comprehensive determination regarding the regulatory treatment of these various types of fixed services that may be offered by licensees. While some commenters argue that all of the fixed offerings described above should be treated as sufficiently related to CMRS to justify uniform regulatory treatment, we believe that a uniform approach would be premature at this time. Instead, we believe that the regulatory issues raised by this proceeding require further development of the record and more specific analysis related to the particular fixed service offerings that carriers develop. Therefore, we propose to refine the approach set forth in the *Notice* by seeking comment on additional guidelines for determining when fixed wireless services may fall within the scope of CMRS regulation.

48. At the outset, we emphasize that our decision to allow carriers to offer co-primary fixed services on spectrum allocated for CMRS does not alter in any way our regulatory treatment of fixed services that have been provided by CMRS providers under our prior rules. In the *CMRS Second Report and Order*, we stated that ancillary, auxiliary, and incidental services offered by CMRS providers fall within the statutory definition of mobile service, and are subject to CMRS regulation. We reaffirm that determination here. In our order today, however, we have broadened the potential scope of fixed services that may be offered by CMRS providers. We therefore seek further comment on the regulatory treatment of such fixed services that may not be considered ancillary, auxiliary or incidental to mobile service.

¹¹⁰ NARUC Comments at 5.

¹¹¹ *Id.* at 4.

49. Several parties argue that because the definition of "mobile service" contains a clause referencing PCS licenses, Congress intended that all service provided through a PCS license would be treated as mobile.¹¹² According to Omnipoint, inclusion of the PCS clause means that the Act, unlike FCC regulations, does not limit the amount of fixed service a PCS provider may offer, and the offering of fixed service by a PCS licensee does not change its status as a CMRS provider.¹¹³ AT&T and CTIA argue, further, that since one goal of Congress and the Commission is regulatory parity for similarly situated CMRS providers, all services provided through a license for a CMRS service, not just a PCS license, come within the definition of "mobile service."¹¹⁴ One could also read the definition of "mobile service" to require the use of "mobile stations" and the "and includes" language which precedes the description of the three enumerated services to mean that they are examples. In that case, a service provided with a PCS license would have to include the use of a "mobile station" to come within the definition of "mobile service" and consequently be considered in the definition of "commercial mobile service." "Mobile station" is defined in the Act as "a radio-communication station capable of being moved and which ordinarily does move."¹¹⁵ We seek comment on these alternative statutory interpretations and their regulatory consequences. Parties should submit support from the legislative history or prior Commission rulings for or against the argument that the language "and includes" in the definition of "mobile service" sets out examples of mobile services, rather than listing additional services which come under the definition.¹¹⁶

50. CTIA also argues that the Commission has substantial discretion under the Act to define "mobile services." CTIA states that this authority stems from the language in the PCS clause of the definition of "mobile service" that refers to "any successor proceeding."¹¹⁷ According to CTIA, that language allows the Commission to establish alternative definitions of

¹¹² See, e.g., CTIA Comments at 10-11, AT&T Comments at 9 n. 15, Airtouch Reply Comments at 3.

¹¹³ Omnipoint Comments at 6-7.

¹¹⁴ "With respect to PCS in particular, Congress has made clear that such services, whether they be fixed or mobile in nature, are to be defined as CMRS and regulated under Section 332. . . . Because of the federal mandate to promote regulatory parity, 47 U.S.C. § 332, the Commission must treat other CMRS in a similar fashion. To do otherwise might give PCS a competitive advantage and harm the development of other wireless services." AT&T Comments at 9 n. 15. See also CTIA Comments at 6-7 n. 1.

¹¹⁵ 47 U.S.C. § 153(28).

¹¹⁶ See, e.g., Sutherland, Statutory Construction, 5th Ed. §§ 47.17-47.18 (1992).

¹¹⁷ ". . . (C) any service for which a license is required in a personal communications service established pursuant to the proceeding entitled 'Amendment to the Commission's Rules to Establish New Personal Communications Services' (GEN Docket No. 90-314 ET Docket No. 92-100), or any successor proceeding." 47 U.S.C. § 153(27)(C).

"mobile service" in successor proceedings.¹¹⁸ We seek comment on the breadth and scope of Commission authority under the PCS clause and the "any successor proceeding" language.

51. As noted above, in the *CMRS Second Report and Order* we found that the definition of "mobile service" includes "all auxiliary services provided by mobile service licensees."¹¹⁹ We seek comment on what precedential value, if any, we should give to our treatment of auxiliary, ancillary, and incidental services as CMRS for regulatory purposes when determining how to regulate other fixed wireless services provided by CMRS providers. For example, because we consider a fixed service that is ancillary to a mobile service to be CMRS, what implications should that have for how we should treat a wholly fixed service that may use no mobile stations.

52. Some parties have also argued that because these fixed wireless services would be provided by CMRS providers in spectrum that has been allocated for CMRS, the service providers must therefore be regulated as CMRS.¹²⁰ We disagree. The regulatory structure for providers of the primary service to which the spectrum is allocated does not necessarily dictate the type of regulation to which every service provider in that same band will be subject regardless of the particular attributes of that service. A pertinent example is BETRS.¹²¹ While BETRS is provided in a spectrum band allocated to Public Land Mobile Service, we have determined that BETRS is a fixed service, rather than a mobile service, and therefore BETRS providers are not subject to CMRS regulation under Section 332.¹²² Similarly, private service licensees in the 220 and 800 MHz SMR bands are not subject to CMRS regulation. Likewise, we do not intend to base our decision here merely on the classification of the majority of users of the spectrum in which the fixed service in question is provided.

53. We believe that, ultimately, the regulatory issues on which we seek comment herein may require resolution on a case-by-case basis. We seek comment on this conclusion, including whether we may be able to establish a uniform approach for determining the regulatory status of fixed services offered on CMRS spectrum. To provide a framework for a case-by-case analysis, we propose to establish a rebuttable presumption that any wireless service provided under a CMRS provider's license would be considered to come within the definition of CMRS and consequently regulated as CMRS. Based on the record in this proceeding, we believe this to be

¹¹⁸ CTIA Comments at 7-12, CTIA Reply Comments at 4-5. *See also* NYNEX Comments at 9 ("As a technical matter, it could be argued that PCS service is 'CMRS' whether it is fixed or not, if the Commission says so." citing 47 U.S.C. 153(27)(C)).

¹¹⁹ Notice at ¶ 3 citing *CMRS Second Report and Order*, 9 FCC Rcd at 1424-25.

¹²⁰ GCI Comments at 3, Nextel Comments at 3

¹²¹ *See* Basic Exchange Telecommunications Radio Service, CC Docket 86-495, *Report and Order*, 3 FCC Rcd 214 (1988).

¹²² Implementation of Sections 3(n) and 332 of the Communications Act, GEN Docket No. 93-252, *Second Report and Order*, 9 FCC Rcd 1411, 1425 (1994).

a reasonable presumption. Most of the fixed wireless service applications which commenters have discussed in the record would be provided in conjunction with a traditional CMRS services such as cellular or paging.¹²³

54. Under our proposed approach, the Commission would allow any interested party to challenge this presumption regarding a particular service offered by a CMRS provider. If a party could demonstrate that the service provider in question does not meet the definition of CMRS for a particular offering, we would not regulate that particular offering as CMRS. We seek comment on this approach and what types of evidence the Commission should evaluate when considering a challenge to a presumption that a fixed wireless service provided by a CMRS provider should be regulated as CMRS. Possible factors may include: the relative mobility of mobile stations used in conjunction with the fixed service; whether the fixed service is part of a larger package which includes mobile services or is offered alone; the size of the service area over which the fixed wireless service is provided; the amount of mobile versus fixed traffic over the wireless system; whether the fixed service is offered over a discrete block of spectrum separate from the spectrum used for mobile services; the degree to which fixed and mobile services are integrated; and whether customers perceive the service to be a fixed service. Part of any analysis of customer perception may also include consideration of how the service is marketed by the CMRS provider to potential customers.

55. We seek comment on the appropriateness of using these factors or other types of evidence that may be presented to rebut this presumption. We also seek comment on the extent to which services provided under separate licenses or by separate entities may be relevant to the regulatory status of a particular fixed service offering provided under a given license. For example, should we consider only the services provided under a particular license or consider the services provided by a common licensee under multiple licenses, e.g., a licensee who provides fixed service under its PCS license and mobile service under a cellular license in the same market. Similarly, in instances where fixed and mobile services are provided by different corporate affiliates, should we look at each affiliate's service separately or at the services provided by the corporation as a whole? Another possible scenario would be where a CMRS provider provides fixed service under its own license and has a joint marketing arrangement or resale agreement with another CMRS provider in that market. How should we consider such arrangements in making our analysis under this presumption? We seek comment on our proposal for regulating fixed wireless service provided by a CMRS provider and we seek alternative suggestions for presumptive regulatory classifications.

56. Some parties have advocated that we regulate any fixed wireless service provided by a CMRS provider as CMRS until such time that the service constitutes a substitute for land line telephone exchange service in a substantial portion of a state.¹²⁴ Under this approach a state

¹²³ See AT&T Comments at 4; Celpage Comments at 4-5.

¹²⁴ See, e.g., AT&T Comments at 1-2, BellSouth Comments at 4, GCI Reply Comments at 3.

would have to petition the Commission under Section 332(c)(3), and the Commission would have to grant such a petition, before a CMRS provider's fixed wireless service would be subject to state regulation. We seek comment on this approach. We also seek comment on what federal regulation should be imposed on a CMRS provider's offering of fixed wireless service if we find that it does not come within the purview of CMRS. To the extent that there are interstate common carrier services, such services would be subject to regulation under Title II; if so are there any Title II regulations from which such services should be exempt?¹²⁵

57. We recognize that we are addressing a related issue in the context of our proceeding on implementation of Section 251 of the Communications Act, as amended by the 1996 Act¹²⁶ - - *i.e.*, in what circumstances, if any, a CMRS provider should be regulated as a "local exchange carrier" under the Act.¹²⁷ Herein we are concerned with whether service providers should be regulated as CMRS if they provide fixed services. While we will review and consider the comments submitted in the Section 251 proceeding, we do not believe that resolution of the issue presented in the Section 251 proceeding resolves the issues presented here. For example, even if we were to find that a CMRS provider could be considered a local exchange carrier in terms of the requirements in Section 251, we tentatively conclude that it could still be considered engaged in the provision of CMRS under Section 332 and therefore exempt from states' regulation of intrastate rates. We seek comment on this tentative conclusion and whether the other obligations imposed on LECs have a direct relationship to the rates charged by CMRS providers, and thus may impact on the rate regulation scheme set out in Section 332.

V. CONCLUSION

58. We believe that the rules and proposals set forth for the provision of fixed services by CMRS providers in this *First Report and Order* and *Further Notice of Proposed Rule Making* will promote the public interest goals set forth by Congress. We conclude that the increased flexibility we are facilitating here will increase quality service and the availability of new technologies to consumers

¹²⁵ See 47 U.S.C. § 160.

¹²⁶ Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, *Notice of Proposed Rule Making*, ¶ 195, CC Docket 96-98, FCC 96-182 (rel. April 19, 1996) ("*Section 251 Notice*").

¹²⁷ The Act defines "local exchange carrier" as "any person that is engaged in the provision of telephone exchange service or exchange access." 47 U.S.C. § 153(26). The definition goes on to state that "[s]uch term does not include a person insofar as such person is engaged in the provision of commercial mobile service under section 332(c), except to the extent that the Commission finds that such service should be included in the definition of such term." We have sought comment in the *Section 251 Notice* on whether, and to what extent, CMRS providers should be classified as local exchange carriers and the factors we should use to make such a determination. We have also sought comment on whether a CMRS provider may be classified as a local exchange carrier for some purposes but not others.